Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	
of the Cable Television Consumer	)	
Protection and Competition Act	)	MM 93-25
of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

PETITION FOR RECONSIDERATION OF DAETC *et al.*

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DAETC *et al*. strongly support the bulk of the Commission's implementation of the non-commercial educational and informational programming set-aside established by Section 25(b) of the 1992 Cable Act.

It is a matter of puzzlement that the Commission can conduct such a thorough review of one section of a statute while at the same time issue a stunningly superficial, perfunctory, and contradictory analysis of the companion public interest and political programming provisions set forth in Section 25(a). Thus, DAETC *et al.* regretfully seek reconsideration of the Commission's implementation of Section 25(a). In adopting rules and policies to enforce this provision, the Commission has, in too many instances, ignored judicial and Commission precedent. It failed to offer comprehensible explanations of its disparate treatment of terrestrial and satellite broadcasters under the same statute. It also entirely failed to address many of the questions which were presented, and placed unjustified reliance upon case-by-case decision-making to resolve questions which will now arise in the intense heat surrounding the end of any political campaign season.

In leaving answerable questions unanswered, the Commission's order deprives candidates of the ability to enforce their rights in time for the election. These needlessly vague rules and the avoidable litigation they will inspire will deny many voters, whose First Amendment right to receive information is "paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). By issuing vague rules that will force candidates to litigate to receive confirmation of their rights, many voters will be deprived of access to candidate speech.

Finally, a recent event has invalidated a critical factual premise upon which portions of the order are based. DAETC *et al.* explain that developments in the DBS industry invalidate portions

of the Commission's order. To the extent that parts of the Commission's decision are based upon conclusions that DBS operators cannot insert political advertisements into program feeds and in any event to do not plan to sell advertising of any kind, they must be vacated and reconsidered in light of DirecTV's February 16, 1999 announcement that it has begun to sell advertising on its retransmitted and exclusively originated programming.

Among the most important matters needing revision, DAETC *et al.* ask the Commission to:

- Correct erroneous statements to the contrary, and clearly hold that the primary factor for a satellite broadcaster considering a candidate's reasonable access claim under Section 312(a)(7) is the candidate's expressed needs;

- Disavow any implication that DBS providers may, as a matter of policy, segregate political advertisements on particular channels in light of recent events which conclusively demonstrate that it is now possible for DBS providers to insert political advertisements into program feeds and because such blanket policies conflict with specific and controlling Supreme Court precedent;

- Conclude that the Commission may not as a matter of procedural law adopt unpublished and unexplained "informal advice" purportedly rendered to cable operators as Commission DBS policy; and, that, as a matter of substance, this secret case law would violated the Communications Act;

- Clarify its vague discussion of Section 315(b), and to the extent that the Commission appears to have adopted existing terrestrial broadcast interpretations of Section 315(b) to DBS, it should formalize those interpretations as agency rules;

- Amend its DBS rules to provide explicit codification of successful enforcement policies currently applied to terrestrial broadcasting and cross-reference such policies in Part 100 of the FCC's rules; to simply compliance with its rules; and

- Adopt rules that will promote access to DBS operator public files by extending recently adopted terrestrial broadcasting public file rules to DBS.

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PETITION FOR RECONSIDERATION OF DAETC *et al.*

The Denver Area Educational Telecommunications Consortium, Inc. ("DAETC"), A*DEC, American Psychological Association, Association of Independent Video and Filmmakers, the Benton Foundation, Center for Media Education, Peggy Charren, Community Technology Centers' Network, Consumer Federation of America, Media Access Project, Minority Media and Telecommunications Council, National Association of Elementary School Principals, National Association of School Psychologists, National Federation of Community Broadcasters, National Writers Union, Office of Communication, Inc. of the United Church of Christ, Public Access Corporation of the District of Columbia and Self Help for Hard of Hearing People ("DAETC *et al.*"), pursuant to Section 1.106 the Commission's rules, submit this Petition for Reconsideration of the Commission's *Report and Order*, FCC 98-307 (rel. Nov. 25, 1998), implenting Section 25 of the 1992 Cable Act. ("*DBS Order*")

INTRODUCTION

DAETC *et al.* strongly support the bulk of the Commission's thoughtful implementation of the non-commercial educational and informational programming set-aside established by Section 25(b) of the 1992 Cable Act.[1]

It is a matter of puzzlement that the Commission can conduct such a thorough review of one section of a statute while at the same time issue a stunningly superficial and perfunctory analysis of the companion public interest and political programming provisions provisions set forth in Section 25(a).

Thus, DAETC *et al.* regretfully seek reconsideration of the Commission's implementation of Section 25(a). Specifically, they request that the Commission reconsider its implementation of the political and public interest programming requirements of Sections 312(a)(7) and 315 of the Communications Act of 1934, as amended ("the Act") and Section 25(a) of the 1992 Cable Act.

In adopting rules and policies to enforce Section 25(a), the Commission has, in too many instances, ignored judicial and Commission precedent. It failed to offer comprehensible explanations of its disparate treatment of terrestrial and satellite broadcasters under the same statute. It entirely failed to address many of the questions which were presented, and placed unjustified reliance upon case-by-case decision-making to resolve questions which will now arise in the intense heat surrounding the end of any political campaign season. In addition, DAETC *et al.* request that the Commission adopt rules to promote access to DBS operators' public files by extending to DBS the rules recently

[1]Many of commenters represented here have also filed a separate petition for reconsideration with respect to the Commission's decision regarding children's programming and the DBS operators' new public file requirements.

adopted for terrestrial broadcasting.

This petition is based in part upon the existence of new and changed facts which require reversal of the *DBS Order*. Specifically, the Commission has placed reliance on representations of DBS operators that they "do not originate programming, [or] sell advertising time...." *DBS Order* at ¶34, and that DBS licensees do not sell advertising because of technical, economic, and legal reasons. *Id*. at n.71. However, on February 16, 1999, DirecTV announced that it is selling spot time on retransmitted cable channels as well as on channels for which it originates programming. Appendix A to this Petition is a copy of DirecTV's press release obtained from its web site. Appendix B contains DirecTV's rate cards for its newly-available advertising.

Although this petition relies upon facts which were not previously presented to the Commission, the Commission must consider them and grant the petition because these events occurred after the Commission issued its order and thus are of the kind described in 47 CFR §§1.106(b)(2)(I) (ii). The material in Attachments A and B was made available to the public on or about February 16, 1999. Since the Commission had adopted the *DBS Order* about two months before that date, this Petition indisputably relies on facts" which relate to events which have occurred...since the last opportunity to present such matters" to the Commission, 47 CFR §1.106(b)(2)(I), and that were "unknown to [the] petitioner until after his last opportunity to present such matters." 47 CFR §1.106(b)(2)(ii).

I. The Absence of Specificity in the Commission's New Rules Burdens Candidates and is Arbitrary and Capricious.

Section 25(a) of the 1992 Cable Act requires the Commission to "apply the access to broadcast time requirement of section 312(a)(7) and the use of facilities requirement of section 315 to" DBS operators. 47 USC § 335(a). The Commission did not fulfill its obligation. As detailed later in this

petition, the Commission's order ignored judicial and Commission precedent, failed to offer comprehensible explanations of the Commission's disparate treatment of terrestrial and satellite broadcasters, entirely failed to address many of the questions which were presented, and placed unjustified reliance upon case-by-case decision-making to resolve questions. Specifically, the Commission failed to recognize the centrality of candidates' needs when implementing Section 312(a)(7); it extended to DBS operators a cable television policy that is invalid under D.C. Circuit precedent; it adopted an embarrassingly unclear decision with respect to Section 315's lowest unit rate requirements; and, it failed to adopt DBS rules incorporating a number of current interpretations used for terrestrial broadcasting that could vastly improve compliance with, and enforcement of, Sections 312(a)(7) and 315. The Commission's order is grossly inadequate to provide a useful framework for enforcing political programming rules to DBS operators, and thus is arbitrary and capricious.

The Commission has developed extensive expertise and thoughtful, detailed regulations to implement sections 312(a)(7) and 315 for terrestrial broadcasters during more than sixty years of enforcing section 315 and in almost thirty years of enforcing section 312(a)(7). The Commission's failure to draw upon and apply this wealth of precedent when adopting rules for DBS providers, particularly as to the lowest unit charge requirements of Section 315(b), falls short of what Congress required.

In leaving answerable questions unanswered, the Commission's order deprives candidates of the ability to enforce their rights in time for an election. These needlessly vague rules and the avoidable litigation they will inspire will deny access to political speech for voters, whose First Amendment right to receive information is "paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Experience from terrestrial broadcasting shows that some candidates will

accept incorrect rejections and that others lack the resources to litigate. Licensees, who will be able to sell air time at rates above those required to be offered to candidates under Section 315(d), have a strong incentive to take hard line positions that will discourage candidate access unless and until the Commission rules otherwise.

The Commission and the courts have recognized that speedy resolution of disputes is necessary during the heat of a campaign. The Commission has gone to great lengths to identify and resolve major questions of law in advance of campaigns precisely to avoid the litigation made inevitable by the *DBS Order*.[2] Yet, by refusing to find that basic terrestrial broadcasting principles and policies are applicable to candidate access to DBS systems, the Commission imposes delay on candidates seeking to utilize their rights during a campaign.[3] The Commission has given DBS operators no incentive to comply with their legal obligations, but rather has given them a financial incentive to stonewall and to obfuscate until the Commission passes on each individual issue with respect to the DBS industry,

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[2]Expedited decision-making has been a constant feature of the Commission's enforcement of Sections 312(a)(7) and 315. For example, within six weeks of their adoption, the Commission issued a public notice designed to assist the public in complying with amendments to Sections 312 and 315. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC2d 510 (1972). In 1972, the Commission expedited release of a portion of a rulemaking to ensure that major issues were addressed prior to the 1972 general election campaign period. *Handling of Public Issues*, 36 FCC2d 40 (1972). The Commission then provided additional, updated guidance. *Licensee Responsibility*, 47 FCC2d 516 (1974). In 1978, the Commission also rushed to issue guidance in advance of the November 1978 elections. *Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC2d 1079, 1094 (1978). More recently in the summer of 1991, the Commission released a Notice of Proposed Rulemaking so that it could further codify its political programming policies "before the 1992 election season gets underway." *Political Programming Codification NPRM*, 6 FCC Rcd 5707 (1991).

[3]Candidates faced with uncertainty are forced to take recourse in the courts seeking injunctions and rapid decision-making, placing burdens on them and on the courts. *See, e.g.*, *Kennedy v. FCC*, 636 F.2d 432, 435 n.6 (D.C. Cir. 1980) (resulting in D.C. Circuit opinion the day after oral argument because the last presidential primaries of 1980 were imminent).

even when those issues are fully explained under policies applicable to terrestrial broadcasters.

This burden will fall hardest on the first candidates seeking to utilize Sections 312(a)(7) and 315, and thus will further delay implementation and enforcement of the law. Requiring candidates seeking time on DBS systems to finance case-by-case proceedings before the Commission will only discourage candidates from availing themselves of the rights granted to them by Congress. Few, if any, candidates will be willing to waste precious time and resources to fight battles that will be unlikely to benefit their own campaigns because the results of these battles will not issue until well after their campaigns are over. Relying upon case-by-case decision-making instead of rulemakings may result in no decisions at all.[4]

The Commission's unexplained failure to decide the issues before it is "agency action unlawfully withheld and unreasonably delayed," 5 USC §706(2)(A) , and its failure to utilize existing and applicable precedent as detailed throughout this petition, is arbitrary and capricious. 5 USC §706(2)(A). Throughout the *DBS Order*, the Commission offered no reasons why it has not adopted, for DBS operators, the relevant and applicable precedent, rules, and supplemental decisions that have been necessary to implement sections 312(a)(7) and 315 for terrestrial broadcasters.[5] Thus, the Commission's adoption of 47 CFR § 100.5(b), which does no more than repeat the statutory language, is arbitrary and capricious.

By way of example, consider one instance in which the Commission attempted to justify its

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[4] *See Farmers Union v. WDAY*, 360 U.S. 525, 530-31 (1959) ("Because of the time limitations inherent in a political campaign, erroneous decisions by a station could not be corrected by the courts promptly enough to permit the candidate to bring improperly excluded matter before the public.")

[5] Merely reciting that satellite broadcasters are different from terrestrial broadcasters, e.g., ¶47, does not explain ***why*** this difference makes existing case law inapplicable.

failure to decide basic questions about Section 312(a)(7) by stating "Congress...did not indicate how the statutory requirements...should be applied to a national, multichannel medium supplied by licensees who contract with third party programmers to provide programming directly to DBS subscribers." *DBS Order* at ¶36. This is almost embarrassingly circular. Congress ***usually*** does not specify details of a general statutory scheme. Determining how a statute should be implemented is the Commission's job, and that is why Congress delegated authority for it to do so in Section 25(b). The failure to give meaning to the law is nothing less than abdication of the task which has been assigned to it.

The Commission repeatedly states that application of sections 312(a)(7) and 315 to the DBS industry will pose difficulties, but then proceeds to take no action to surmount them. *See, e.g., DBS Order* at ¶34. To refuse to provide guidance to both candidates and members of industry in light of a statute that the Commission itself finds difficult to apply leaves candidates seeking to avail themselves of their rights with little recourse. The Commission has failed to implement the statute in a manner that gives effect to Congress's decision to apply Sections 312(a)(7) and 315 to DBS operators and has not fulfilled its obligation to "apply the access to broadcast time requirement of section 312(a)(7) and the use of facilities requirements of section 315 to providers of direct broadcast satellite service providing video programming." 47 USC § 335(a).

II. The Commission Incorrectly Implemented Section 312(a)(7).

Section 312(a)(7) requires broadcasters to provide reasonable access to all federal candidates. The Commission's decision, which in many instances appears to incorporate by implication several highly questionable assertions from in the *Notice of Proposed Rulemaking* in this proceeding, *Notice of Proposed Rulemaking*, 8 FCCRcd 1589 (1993) (*"NPRM"),* is plagued by vague and ambiguous language. To the extent that its findings are articulated, they ignore years of judicial and FCC pre-

cedent establishing that candidates' expressed needs are the standard against which other countervailing factors must be balanced in assessing a Section 312(a)(7) time request. The Commission also made erroneous conclusions about the ability of DBS providers to segregate political advertisements to certain channels. *See DBS Order* at ¶¶38, 41.

In the *NPRM*, 8 FCC Rcd at 1593, the Commission's "tentative view" was that candidates' requests for time should be assessed case-by-case, based on licensees' good faith judgments. While it proposed generally to follow terrestrial broadcasting case law, *id*, the *NPRM* suggested that the traditional standard should be narrowed to take into account the multichannel nature of DBS. 8 FCC Rcd at 1594. It also asked whether "the extent to which DBS may be utilized for political advertising by federal candidates" should be further limited to accommodate "any specific burdens that this may create for DBS operators." *Id.* The Commission's "tentative view" was "that any such burdens on the DBS operators would be considered in applying these access requirements to DBS." *Id.*

A. The Commission Does Not Acknowledge the Primacy of Candidates' Expressed Needs in the Assessment of Requests for Access Subject to Section 312(a)(7).

The *DBS Order* does not explicitly adopt the "tentative views" offered in 1993, but it does appear to embrace them. To the extent the Commission may have adopted those "views," the *DBS Order* violates Section 312(a)(7). Congress unambiguous directed that Section 312(a)(7) be applied to DBS, without any language expressing concern that such application would pose greater burdens than those terrestrial broadcasters have encountered. If it had wished to impose lesser requirements, it would have done so. The Commission cites no case law issued since 1993, when the "tentative" interpretations were offered, thus fails to take into account subsequent decisions. Section 312(a)(7) case law stresses the needs of candidates, not burdens on licensees, as the primary consideration in

assessing candidates' requests. The Commission's failure to mention those needs is erroneous as a matter of law. Moreover, to the extent that the Commission appears to have narrowed the application of Section 312(a)(7) based on the supposed characteristics of the service without balancing those factors against the needs of candidates, the error is compounded.

The Commission has repeatedly found candidate needs to be the threshold factor to be considered when assessing time requests under Section 312(a)(7). "One of the primary purposes of the Federal Election Campaign Act of 1971 was to 'give candidates for public office greater access to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters.'" *CBS, Inc. v. FCC*, 453 U.S. 367, 379 (1981) (*quoting* S. Rep. No. 92-96). This goal -- to improve the functioning of democracy by allowing candidates to bring their messages to the voters -- must remain, as the Commission has previously found, an "extremely important and serious" mandate. *Id.*

Because the central purpose of Section 312(a)(7) is centered on improving a candidate's communication with the public, candidates' needs have been considered central in implementing Section 312(a)(7). In *Carter-Mondale*, 74 FCC2d 642 (1979), a decision subsequently upheld by the Supreme Court in *CBS, Inc. v. FCC*, supra, the Commission described its policies implementing Section 312(a)(7). It stated that while several factors are relevant to a broadcaster's obligation to grant candidates access under Section 312(a)(7), "we placed particular emphasis on the candidates's needs." It further concluded that: "Federal candidates are the intended beneficiaries of Section 312(a)(7) and therefore a candidates's desires as to the method of conducting his or her media campaign should be considered by licensees...." *Id*. at 642 (*quoting Commission Policy in Enforcing Section 312(a)(7)*, 68 FCC2d 1079, 1089 n.14). The Commission further stated, "[i]n taking this factor into account,

the licensee is not simply to substitute its judgment regarding the candidates's needs for the candidate's own assessment...." *Id.* "The candidate must also be afforded flexibility to address the prime time audience *in the manner best suited to his campaign*." *Id.* at 643. (emphasis added) "A Federal candidate's decisions as to the best method of pursuing his or her media campaign should be honored as much as possible under the 'reasonable' limits imposed by the licensee." *Id.* (*citing* 63 FCC2d at 1090).

Upon reconsideration in *Carter-Mondale*, the Commission emphasized the importance of a broadcaster's individualized consideration of a specific request. The Commission reiterated its concerns that blanket statements that a licensee had considered candidate's needs were insufficient. *Carter-Mondale Reconsideration*, 74 FCC2d at 657, 672 (1979). The Commission stated that "such a standard could too easily allow decisions based on broadcaster's own convenience or economic interest to be couched in terms of amorphously defined candidate needs."[6] *Id.*

In upholding the Commission's decision, the Supreme Court stated that broadcasters must consider candidate requests "on an individualized basis, and broadcasters are required to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purposes in seeking air time." 453 U.S. at 387. The Court further determined that mechanically applied blanket policies by broadcasters would violate Section 312(a)(7), stating that "each request must be examined on its own merits. While the adoption of uniform policies might well prove more convenient for broadcasters, such an approach would allow personal campaign strategies and the exigencies of the political process to be ignored." *Id*. at 389.

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[6]In subsequent policy statements, the Commission has fully adhered to the policies adopted by the Commission in *Carter-Mondale* and subsequently affirmed by the Supreme Court. *See Political Programming Codification Order*, 7 FCC Rcd 678, 681 (1991).

In *Becker v. FCC*, 95 F.3d 75, 80 (D.C. Cir. 1996), the D.C. Circuit rejected a similar Commission effort to narrow candidates' Section 312(7) rights without regard to a candidates' desire to reach a desired audience, finding that the Commission may not "create[] a situation where a candidate's ability to reach his target audience may be limited and his `personal campaign strategies...ignored. *See CBS, Inc.* [*v. FCC*], 453 U.S. at 389."

Thus, the *DBS Order* must be revised to make clear that DBS operators must give primacy to candidates' needs.

B. The Commission Incorrectly Articulated the Standard By Which Non-National Candidate Access Must Be Evaluated.

The Commission improperly concludes that can and should defer consideration of whether a non-national Federal candidate may obtain access to DBS systems. *DBS Order* at ¶38. It further concludes that the factors it will consider are: "the number of candidates requesting time, the technical difficulties in satisfying the request, and the availability of reasonable alternatives." *Id.*

To the extent the Commission appears to permit a blanket policy under which Congressional candidates may be denied access to DBS, this determination must be reversed. The plain language of Section 312(a)(7) gives rights to "federal candidates" without limitation and makes no distinction between Congressional and presidential candidates. The Commission has specifically held that the term reaches Congressional candidates. *See, Use of Broadcast and Cablecast Facilities by Candidates for Public Office,* 34 FCC2d 510 (1972).

To be sure, time requests must be balanced against other factors, and a large number of requests might require limitations, although it is hard to imagine that a DBS system with several hundred channels cannot accommodate the amount of time which might be sought by the handful

of candidates from states large enough to justify the investment in DBS air time. However, the Commission has erroneously introduced "the availability of reasonable alternatives" as a factor under Section 312(a)(7). This consideration, which was not mentioned in the 1993 *NPRM*, marks a substantial departure from all prior FCC interpretations of Section 312(a)(7). It has no basis in the statute, and is utterly at odds with the core purpose of Section 312(a)(7), which is to expand access. By definition, rejection because of the availability of an existing alternative, maintains access at current levels or reduces it. The inclusion of "reasonable alternatives" must be reversed.

C. The Commission Must Reject any Implication that it is Acceptable for DBS Providers to Segregate Political Advertisements.

The Commission concluded that, because it was difficult for DBS operators to "alter program feeds provided independent programmers," it might be possible, under Section 312(a)(7)'s reasonableness standard, for a DBS provider legitimately to segregate political advertisements from other programming channels. *DBS Order* at ¶41. It further concluded it would decide the matter on a case-by-case basis, and would consider "the amount of time requested, the number of candidates in the race, possible program disruption, technical difficulties of providing the access requested, and the availability of reasonable alternatives." *Id.* Once again, the Commission's formulation entirely omits the primacy of the candidate's needs when evaluating the reasonableness of a broadcaster's decision under Section 312(a)(7). As such, the *DBS Order* is incorrect as a matter of law and must be reversed.

Moreover, as demonstrated by Attachment A, DBS operators have now demonstrated that it ***is*** technologically feasible for DBS operators to alter program feeds to incorporate advertisements. Given this fact, the Commission must vacate its decision that it might be acceptable for DBS operators to segregate political advertisements.

In addition, the Commission failed to apply binding Supreme Court precedent stating that broadcasters may not adopt blanket policies relegating candidates to certain portions of the broadcast day because such policies would violate broadcasters' obligations under Section 312(a)(7) to consider each candidate's requests individually. In response to DAETC *et al.*'s request that the Commission conclude it would be unacceptable for DBS operators to adopt rigid policies relegating candidates to a separate channel for candidates speech, the Commission merely concluded that such a practice would be "problematic." *DBS Order* at ¶¶40, 41.

Such a practice would not be "problematic." It would be ***unlawful***. The Supreme Court, in *CBS, Inc. v. FCC*, 452 U.S. at 390, upheld the Commission's rules prohibiting blanket rules concerning access. The Court stated that "312(a)(7) assures a right of reasonable access to *individual* candidates for federal elective office, and the Commission's requirement that their requests be considered on an *individualized* basis is consistent with that guarantee." (emphases in the original). The Commission must clarify that proscriptions against blanket rules apply to both satellite and terrestrial broadcasters.

The Commission also did not clarify, as it did with respect to DBS operator obligations under Section 315, that DBS operator contract obligations cannot justify segregation of political advertising. *DBS Order* at ¶41. In response to the *NPRM*, DBS operators argued that, among other reasons, their contractual obligations would prevent them from incorporating political advertising on channels that they do not program directly. *See id.* at ¶¶39-40. In response, DAETC *et al.* asked that the Commission preempt DBS operators' contractual obligations to the extent that they preclude compliance with Section 312(a)(7). *Id.* at ¶40. Although the Commission clearly understood that a private contractual agreement cannot justify failure to comply with Section 315, *see id.* at ¶45 ("DBS

providers will be required to ensure, by contractual means or otherwise, that [the statute and Commission rules] are followed."), the Commission failed to make the identical conclusion with respect to Section 312(a)(7). The Commission must clarify that DBS providers may not relieve themselves of their statutory obligations by negotiating contracts that fail to comply with the law.

III. The Commission May Not Use Unpublished "Informal Advice" Given to Cable Operators As Precedent for DBS Policy Implementing Section 315.

In language which is so imprecise as to be reversible for that reason alone, the Commission appears to have ruled that candidates seeking Section 315 "equal opportunities" are not entitled to receive time on the same channel as the appearance which triggered their response. The Commission's order seems to give DBS operators the incorrect impression that they are obligated only to grant candidates access to audiences of equal sizes when granting equal access under Section 315. Such a practice would violate long-standing Commission precedent and binding Supreme Court case law and the intervening decision issued in *Becker v. FCC*.

In one breathtaking paragraph, the Commission appears to have adopted as formal Commission policy for DBS a body of vague, unpublished and unexplained secret law (elsewhere described as what "cable operators have been informally advised"). The procedural and substantive deficiencies of this action are manifest. Once clarified, whatever the Commission may have held, or intended to hold, should be reversed.

In the *NPRM*, the Commission sought comment on whether certain policies purportedly applicable to cable television operators should be employed for DBS operators because the both are multi-channel video providers. Without a single reference to precedent, or even identification of any decisionmaker, the Commission stated that "cable systems have been informally advised to air political

advertisements on channels with comparable size." 8 FCCRcd at 1594. It asked for comment as to whether this alleged practice should be applied to reasonable access and equal opportunities claims. *Id.*

In its 1992 *NPRM*, the Commission sought comment on whether certain policies applicable to cable television operators should be applied to DBS providers because they are multi-channel video systems. 8 FCC Rcd at 1594. The Commission noted that, in the past, Commission staff had provided "informal advice" to cable operators with respect to their obligations under Section 315. *Id.*. The Commission stated that it "has never required cable systems to air opposing candidates' advertisements on the same channels or to take into consideration the demographics of channels. Rather, the staff has informally advised CATV systems to ensure that the channels utilized have comparable audience size." *Id.* Because cable operators are also multi-channel video providers subject to section 315, the Commission asked about the relevance of this informal policy for DBS providers. *Id.*

That "the staff" might have "informally advised CATV systems to ensure that the channels utilized" by candidates paying for or receiving "equal opportunities" under Section 315 "have comparable audience size" is of no moment, and of no precedential significance. What "staff" - the Cable Bureau, the Mass Media Bureau, a Commissioner's legal assistant? What was the "advice" - was it qualified, or based on specific facts? Was this based on an adversarial proceeding where a candidate might have presented different information or arguments? And, most importantly of all, what reasons were given to justify the "advice"?

Nor does the Commission give this "advice" any greater weight by making its existence known through reference to it in the *NPRM*; this is no substitute for the notice and comment rulemaking necessary to adopt agency rules. What an unnamed staffer may have said to someone at some unstated

time in the past under unknown circumstances based on unknown facts has no greater weight than any other proposal the Commission might make in an *NPRM*. Whatever this "advice" may be, it is not precedent.[7]

The *NPRM* provides no foundation upon which reasoned policy determinations could be based, but in attempting to build upon it, the *DBS Order* elevates secret law to new, if united, levels of authority. Although the imprecise language may not constitute a holding, the Commission appears to have applied this "informal advice" to DBS, by stating that it will apply Section 315 "and the Commission's rules, as well as the policies delineated in prior Commission orders, to DBS providers." par 44 The confusion is exacerbated by mention to the "informal advice" as "existing Commission rules"; there are no citations to any particular rule, because there is no “rule” to cite. Even so, the context of the decision leaves a clear impression that the Commission has held that equal opportunities need not be provided on the same channel and that demographic concerns need not be taken into account in assessing candidates’ requests.

Assuming that is what the Commission wants to hold, it has no basis for doing it. Certainly the staff's "informal advice" to cable operators, even when implausibly recast as non-existent "cable

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[7]The Commission is even further off base in attempting to apply similar decisionmaking to Section 312(a)(7). The *NPRM* solicited comment (at ¶24) as to whether the supposed fact that "cable operators have been informally advised" how to apply Section 315 should also govern the application of Section 312(a)(7) "reasonable access" requests. The *DBS Order* is so muddled on this point that it is unclear if this "informal advice" played any role in the reasoning. However, to the extent the *DBS Order* does rely upon such "informal advi[c]e," it must be vacated, since the Commission ruled two years earlier that Section 312(a)(7) does not even apply to cable. *Political Programming Codification Order*, 7 FCC Rcd at 680 n.111. For what it is worth, the *NPRM* incorrectly states (at ¶23) that Section 312(A)(7) has never previously been applied to multi-channel video providers. In fact, the Commission enforced that provision to cable for a number of years after its enactment. *See, e.g., Use of Broadcast and Cablecast Facilities By Candidates for Public Office,* 34 FCC2d 510 (1972).

rules," is not valid precedent. But no other reason, no other citation, and no other principle is offered to justify this action. It must be vacated.[8]

In *Becker v. FCC*, 95 F.3d at 84, the Court reemphasized that an FCC policy permitting "channeling" to a different time period did not implicate Section 315(a) "[because the equal opportunity requirements 'forbid any kind of discrimination by a station between competing candidates....'" *id., quoting Political Primer 1984*, 100 FCC2d 1476, 1505 (1984). Then, in a holding of direct relevance here, the Court explained that

> This is so because if a station channels one candidate's message but allows his opponent to broadcast his messages in prime time, the first candidate will have been denied the equal opportunity guaranteed by this section. On the other hand, if the station relegates the opponent's advertising to the broadcasting Siberia to which it was assigned, it would be violating the opponent's right of reasonable access under section 312(a)(7).

Id. Placing one candidate on one channel with one demographic make up while relegating a second candidate to the "Siberia" of an inferior demographic cannot be squared with the Becker decision.

[8]In rejecting DAETC *et al.'s* arguments, the Commission misrepresented them. The Commission represented DAETC's arguments as focusing on whether candidates have the right to reach audiences of similar sizes. But DAETC *et al.* also argued that candidates have a right to reach a particular audience demographic in addition to an audience of a particular size. *Compare DBS Order* at ¶40 *with* DAETC *et al.* reply comments at 10 (filed May 28, 1997).

IV. The Commission's Lowest Unit Charge Decisions Regarding DBS Operators are Not Clear and are Based on a Fact that is No Longer True; DBS Providers Have Begun to Sell Advertising.

The Commission's decision regarding Section 315's lowest unit charge requirements is exceedingly vague. To the extent it can be discerned, it appears that the Commission has adopted for DBS providers none of the policies set forth in Section 73.1942 of the Commission's rules. *DBS Order* at ¶47. The Commission appears to base whatever it may have held on a belief that DBS providers do not sell commercial advertising time because it states, "[although we recognize that DBS providers do not currently have commercial rates on which to base a L.C. determination, they can set a reasonable rates, based on consideration of marketplace factors such as what other media charge to reach a similar audience if they sell time to candidates pursuant to Sections 312 or 315...." *Id.*

DAETC *et al.* also seek clarification as to whether 47 CFR §73.1942 applies to DBS operators. If the Commission has chosen not to adopt Section 73.1942, DAETC *et al.* seek reconsideration, and ask that the Commission apply specific portions of Section 73.1942 to DBS operators. Because most of the Commission's lowest unit charge rules are sufficiently general, they require little or no tailoring for DBS advertising practices.

The Commission should also adopt specific rules for DBS operators because DBS operators have begun to sell advertising, and therefore, adopting rules is no longer premature. Because facts have changed since its decision was issued, the Commission must vacate portions of its decision that rely on those facts. As described herein, one DBS provider has just announced that it will begin to sell advertising time. Therefore, to the extent that the Commission based its lowest unit rate decision or the conclusion that DBS providers do not, and would not, sell advertising time, the Commission's decision is no longer accurate.

A. The Commission Must Clarify Its Decision.

DAETC *et al.* seek clarification of which policies the Commission is applying to DBS operators. The Commission's *DBS Order* is not clear on this point. In the *DBS Order*, the Commission states "DBS providers, like broadcasters and cable operators, must disclose to candidates information about rates and discount privileges and give any discount privileges to candidates." *DBS Order* at ¶48. As a footnote to this sentence, the Commission cites its *Political Programming Codification Order*, 7 FCC Rcd at 683-87, n. 101. The cited section of the *Political Programming Codification Order*, however, does not discuss the lowest unit charge rule or Section 315(b).[9] This citation of the *Political Programming Codification Order* is particularly confusing because at pages 687-98 of the *Political Programming Codification Order*, the Commission ***does*** discuss and adopt changes to its Section 315(b) rules and, in Appendix B to that order, incorporates those changes in Section 73.1942 of its rules. Nowhere in the *DBS Public Interest Order*, however, does the Commission clarify whether it believes that DBS operators are bound by Section 73.1942, or whether they are bound only by the non-codified principles underlying Section 73.1942, some of which are discussed at pages 687-698 of the *Political Programming Codification Order*.

B. It is No Longer Premature to Adopt Detailed Lowest Unit Charge Rules for DBS Providers.

It appears that, to the extent that the Commission did not adopt detailed L.C. rules for DBS operators, the Commission did so because it believed that DBS operators do not sell advertising. As noted above, it seems to believe that "DBS providers do not currently have commercial rates on which

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[9]This portion of the *Political Programming Codification Order* discusses and adopts modifications to the Commission's policies with respect to section 315(a) and its sponsorship identification guidelines implementing Section 317.

to base a L.C. determination...." *DBS Order* at ¶48.[10]

Although as late as June 1998 the DBS industry informed the Commission that it did not sell advertising time directly to the public, DirecTV may have been considering this option since 1996 and has recently begun selling advertising through a national advertising representative.[11] Appendix A shows that DirecTV now offers advertising on cable channels and its exclusively-originated programming.

C. Because They are Sufficiently Generic, the Commission Should Apply Most Aspects of Section 73.1942 to DBS Operators.

The Commission should rely upon its significant expertise in implementing Section 315(b) when applying it to DBS operators. Most of the Commission's rules implementing Section 315(b) can easily be applied to any entity that sells advertising; no special tailoring is needed.

The Commission should remove any references to terrestrial broadcasters advertising practices that do not apply to DBS operators, but retain all of its other policies. Adoption of most of section 73.1942 for DBS operators would allow candidates to avail themselves of their rights under 315(b) in the most streamlined manner. Upon analysis, it appears that most of the Commission's rules could easily be applied to DBS operators because the rules are written using specific practices as examples,

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[10] Elsewhere in the *Order*, the Commission finds that "[u]nlike network broadcasters, DBS licensees currently do not originate programming, [or] sell advertising time...." *Id*. at ¶34; *see also* ¶47; ¶34, n.71 *citing* DirecTV's comments stating that DBS licensees do not insert advertising for technical, economic and legal reasons.

[11] *See* Joe Schlosser, *Broadcasting and Cable*, "CTTD sells DirecTV ads" at 37 (Feb. 22, 1999). DirecTV's president Eddy Hartenstein is quoted as saying "[Selling advertising] is something that we have been wanting to do for a while...." *Id.* In addition, an executive vice president of Columbia Tristar, the agency who will be marketing DirecTV's advertising, stated, "[W]e began talking with them three years ago and it has turned into something...beneficial...." *Id. See also* "Columbia TriStar Advertiser Sales (CTAS) Partners with DirecTV as Exclusive National Advertising Representative," Feb. 16, 1999 found at http://web.directv.com:80/news/columbiatri.html.

and because many references are to common advertising practices that are relevant regardless of whether a terrestrial or satellite broadcaster is selling the advertising. Specifically, the Commission should apply 73.1942(a); (a)(1)(I), (iii), (iv), (vi), (viii), (ix), (x), (xi), (xii), (xiii); (a)(2); and (b) to DBS operators.[12]

V. The Commission Should Adopt Rules and Policies that Will Facilitate Enforcement of Sections 312(a)(7) and 315.

The Commission has neglected to adopt several rules and policies that clearly need no special modifications for the DBS industry, and would speed and simplify enforcement of sections 312(a)(7) and 315. The Commission should adopt successful policies from the terrestrial broadcast arena that will facilitate enforcement of Sections 312(a)(7) and 315 with respect to DBS advertising and should adopt clarifications to the exceedingly vague rules adopted in Part 100.

The Commission appears to have gone out of its way in some instances to make it difficult for candidates to exercise their rights under the law. Many helpful and practical policies that have long been used by the Mass Media Bureau to implement Sections 312(a)(7) and 315 were ignored by the Commission in its *DBS Order*. For example, the Commission failed to adopt the procedural policies found in its *1984 Political Primer* providing for expeditious resolution of political advertising disputes during a campaign. The *1984 Political Primer* clearly sets the tone that broadcasters must

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[12] The Commission may wish to alter some terms used in this section to the extent that they are inapplicable to advertising sold by DBS operators. For example, 73.1942(a)(1)(I) could be adapted as follows:

> (I) A candidate shall be charged no more per unit than the station charges its most favored commercial advertisers for the same classes and amounts of time for the same periods. Any station practices offered to commercial advertisers that enhance the value of advertising spots must be disclosed and made available to candidates on equal terms. Such practices include but are not limited to any discount privileges that affect the value of advertising or any other factors that enhance the value of the announcement.

act expeditiously to resolve complaints by candidates and pledges the Commission to prompt resolution of complaints. Moreover, the Mass Media Bureau routinely provides telephone numbers to the public so that candidates may obtain informal staff advice rapidly during the heat of a political campaign. The *DBS Public Interest Order*, by contrast, did not even indicate to which division of the Commission candidates should turn if they have questions regarding their rights under Sections 312(a)(7) and 315 with respect to DBS operators.

As the Commission and the courts have previously recognized, access delayed is access denied in the fast-paced world of political campaigns. "[I]t is of small solace to a losing candidate that an appellate court might eventually find that the Commission's approval of a licensee's...decision was an abuse of discretion or contrary to law." *Becker*, 95 F.3d at 81.

The Commission also adopted extremely vague rules in part 100 to implement sections 312(a)(7) and 315. Although in some instances the Commission made a wise choice and adopted its previous interpretations of Sections 312(a)(7) and 315's terms, *DBS Order* at ¶ 45, the Commission did not reflect these decisions in its rules. Thus, although the Commission concludes at paragraph 45 of the *DBS Order* that it will adopt the definitions of "use" and "legally qualified candidate" in the DBS context, it did not reflect that decision in 47 CFR 100.5(b).

Needlessly refusing to codify decisions in Commission rules makes it more difficult for candidates, who are not as familiar with Commission policy and practice, to avail themselves of their legal rights. Moreover, clearly codifying the definitions of these terms for terrestrial broadcasters but failing to reflect the same decision in the DBS rules creates a misimpression. A candidate might easily conclude that DBS operators have obligations different from terrestrial broadcasters because the rules applying to the two industries are different. To remove this confusion, the Commission should take

the simple administrative step of explicitly cross-referencing, in Section 100.5(b), the definitions of "use" and "legally qualified candidate" that appear at 47 CFR §§ 73.1940 and 73.1941.

VI. The Commission Should Adopt Rules to Promote Access to DBS Operator Public Files.

Several of the parties represented here are not included on the separate filing requesting improved public access to DBS operators' public files fully support that petition.[13] Because DBS is a national service, subscribers, political candidates and programmers seeking information from a DBS provider could be located anywhere throughout the country. It would pose an unreasonable burden on these members of the public to travel to a DBS providers' headquarters to obtain records about providers' use of their noncommercial set-aside capacity and their dispositions of requests for political advertising time.

The Commission should adopt rules facilitating access to DBS providers' public files based on the rules currently in place for terrestrial broadcasters as adopted in the Commission's recent *Main Studio and Public Inspection Files of Broadcast Television and Radio Stations*, 13 FCC Rcd 15691 (1998). Therefore, DBS providers should be required to make available, by mail upon telephone request, photocopies of documents in their public files. Providers should also assist callers by answering questions about the actual contents of the station's public file. Providers may require individuals requesting documents to pay for photocopying and the provider should pay for postage. In addition, providers should be encouraged to put information on the Internet. *Id.*

[13]As indicated in note 1, *supra*, some, but not al,l of the parties represented here have filed a separate petition seeking reconsideration of the Commission's decision regarding children's programming and the accessibility of DBS operators' public files.

Conclusion

The Commission should reconsider the issues as described herein and provide such relief as is requested.

Respectfully submitted,

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March 10, 1999

ATTACHMENT A

DIRECTV. PRESS

RECENT NEWS ARCHIVE

SEARCH

PROGRAMMING

PRICING

MOVIES

SPORTS

PRESS

Q&A

SALES

COMMERCIAL

DIRECTV PRODUCTS

CUSTOMER SERVICE

JOBS@DIRECTV

FEEDBACK

HOME

Columbia TriStar Advertiser Sales (CTAS) Partners with DIRECTV® as Exclusive National Advertising Representative

Relationship To Offer Maximum Efficiency For Targeted Advertisers

CULVER CITY, CA, February 16, 1999 -- Columbia TriStar Advertiser Sales (CTAS), the advertiser supported sales division of Columbia TriStar Television Distribution, and DIRECTV, Inc. have entered into a multi-year agreement in which CTAS will be the exclusive representative for national spot sales on cable networks and advertiser-supported channels on the DIRECTV platform. DIRECTV is the nation's leading direct broadcast satellite television service, delivering more than 185 channels of programming to more than 4.5 million subscribers.

The joint announcement was made today by Eddy W. Hartenstein, president of DIRECTV, Jon Feltheimer, president, Columbia TriStar Television Group, executive vice president, Sony Pictures Entertainment, and Barry Thurston, president, Columbia TriStar Television Distribution (CTTD).

Initially, CTAS will offer availabilities to national advertisers in clusters that will include sports, news, information and entertainment programming, allowing sponsors to target specific demographic profiles, achieving maximum reach with very little duplication. Within the DIRECTV programming lineup, advertisers will have access to such prestigious networks as Comedy Central, USA, TNT, TBS, A&E, MTV and others.

Additionally, availabilities will be offered in such exclusive DIRECTV sports packages as NFL SUNDAY TICKET, which delivers up to 13 games every Sunday of the regular season, and "Mega March Mania," which will deliver up to 34 out-of-market games from the first three rounds of the 1999 NCAA Men's Basketball Tournament. Advertisers will also have the opportunity to develop targeted campaigns utilizing new interactive and e-commerce services DIRECTV plans to introduce beginning this year.

"The opportunity to be the first in bringing a national advertising component to the country's premier direct-to-home digital television entertainment service is tremendously exciting," commented Feltheimer. "DIRECTV's growth as a major program supplier, coupled with the reputation and capabilities of CTAS, is a nice fit and represents the beginning of what we believe will become a long and mutually rewarding relationship."

"With more than 4.5 million subscribers, DIRECTV is the fourth largest multi-channel video service in the country, and we provide advertisers a new national media platform in which to reach a highly targeted and desirable audience," said Hartenstein. "The landscape for media buying is changing and our relationship with CTAS will allow us to expand our business and generate incremental revenue."

Since its launch in 1994, DIRECTV has used network availabilities to promote the wide array of movies, sports and special event programming available to its subscribers.

DIRECTV parent Hughes Electronics Corporation recently announced three transactions designed to significantly grow the DIRECTV business and expand its channel capacity: a merger with United States Satellite Broadcasting; the acquisition of the 2.3 million-subscriber PRIMESTAR direct broadcast satellite medium-power business; and the acquisition of the Tempo high-power satellite assets. Upon receipt of regulatory and other approvals of these transactions, DIRECTV will feature more than 370 channels of available capacity.

Since its inception in 1982, Columbia TriStar Advertiser Sales has become one of the fastest growing divisions within Sony Pictures Entertainment. From two employees to its present staff of 32, CTAS has also achieved comparable growth in the amount of inventory the division handles.

CTAS is charged with national advertising sales for first-run and off network programming, including such shows as "Seinfeld," "Mad About You," "Ricki Lake," "V.I.P.," "Donny & Marie," "The Newlywed Game," "The Dating Game" and "Walker, Texas Ranger," and is responsible for national advertising sales for Sony Pictures Entertainment's The Game Show Network as well as worldwide advertiser supported advertising sales, coordinating the division's efforts internationally with CTTD and Columbia TriStar International Television (CTIT).

Columbia TriStar Advertiser Sales is a Sony Pictures Entertainment company. Sony Pictures' global operations encompass motion picture production and distribution, television programming and syndication, home video acquisition and distribution, operation of studio facilities, development of new entertainment technologies and distribution of filmed entertainment in 67 countries worldwide. Sony Pictures Entertainment can be found on the World Wide Web at www.spe.sony.com.

DIRECTV provides more than 4.5 million subscribers with access to more than 185 channels of programming, such as popular cable networks and commercial-free audio channels in digital-quality picture and sound, and more sports than any other direct broadcast satellite service or cable provider. DIRECTV is a registered trademark of DIRECTV, Inc., a unit of Hughes Electronics Corporation. The earnings of Hughes Electronics are used to calculate the earnings per share attributable to GMH (NYSE symbol) common stock

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ATTACHMENT B

Columbia TriStar
Advertiser Sales

DIRECTV

DIRECTV Rate Card
1ST Quarter 1999
Young Adult-Cluster A

USA, MTV, M2, VH1, Nickelodeon, TV Land

Daypart	:30	:60
8A-6P	$300	$600
6P-1A	$450	$900
1A-8A	$150	$300

DIRECTV Subscriber Base- 4.5 Million

Terms and Conditions

- **1 creative per order; separate creative must be booked as separate orders!**
- **Each order must have a minimum of 7 spots (can be split between clusters).**
- **All orders MUST be received by COB Monday for orders to start following week.**
- **All schedule changes, cancellations &/or rate changes must be received by COB Monday prior to the start week. No schedule changes of any kind can be accommodated after Monday.**
- Advertisers that purchase a unit will run in a roadblock on all networks in Cluster A.
- Post Log times will be available on Wednesday of the following week. Post Logs serve as a confirmation on all orders. All discrepancies must be discussed with in 7 days of receiving post logs.
- All commercial copy must be approved by Columbia Tristar Television.
- All new advertisers will be required to fill out credit applications regardless if the advertiser is paying cash in advance. Please allow 2 weeks for credit approval. Credit terms will be decided prior to placement of any schedule. All checks to be made out to Columbia Tristar Television.

Columbia TriStar
Advertiser Sales

DIRECTV

DIRECTV Rate Card
1ST Quarter 1999
Adult-Cluster B

TNN, TNT, TBS, A&E, CNN, Discovery, Headline News

Daypart	:30	:60
8A-6P	**$500**	**$1000**
6P-1A	**$750**	**$1500**
1A-8A	**$200**	**$400**

DIRECTV Subscriber Base- 4.5 Million

Terms and Conditions

- **1 creative per order; separate creative must be booked as separate orders!**
- **Each order must have a minimum of 7 spots (can be split between clusters).**
- **All orders MUST be received by COB Monday for orders to start following week.**
- **All schedule changes, cancellations &/or rate changes must be received by COB Monday prior to the start week. No schedule changes of any kind can be accommodated after Monday.**
- Advertisers that purchase a unit will run in a roadblock on all networks in Cluster B.
- Post Log times will be available on Wednesday of the following week. Post Logs serve as a confirmation on all orders. All discrepancies must be discussed with in 7 days of receiving post logs.
- All commercial copy must be approved by Columbia Tristar Television.
- All new advertisers will be required to fill out credit applications regardless if the advertiser is paying cash in advance. Please allow 2 weeks for credit approval. Credit terms will be decided prior to placement of any schedule. All checks to be made out to Columbia Tristar Television.